

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of:)
Closed Captioning of Internet)
Protocol-Delivered Video)
Programming: Implementation) MB Docket No. 11-154
of the Twenty-First Century)
Communications and Video)
Accessibility Act of 2010)

**Reply Comments to the Oppositions of the Association of Public Television
Stations and Public Broadcasting Service, the National Association of
Broadcasters, and the National Cable & Telecommunications Association to
the Petition for Reconsideration Regarding "Video Clips" by**

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI)
National Association of the Deaf (NAD)
Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN)
Association of Late-Deafened Adults (ALDA)
Hearing Loss Association of America (HLAA)
Cerebral Palsy and Deaf Organization (CPADO)
Technology Access Program at Gallaudet University (TAP)

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DISCUSSION

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), the National Association of the Deaf (NAD), the Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), the Association of Late-Deafened Adults (ALDA), the Hearing Loss Association of America (HLAA), the Cerebral Palsy and Deaf Organization (CPADO), collectively, “Consumer Groups,” and the Technology Access Program at Gallaudet University (TAP), pursuant to rule 1.429, respectfully submit these reply comments to the oppositions of the Association of Public Television Stations and Public Broadcasting Service (collectively, “APTS”), the National Association of Broadcasters (“NAB”), and the National Cable & Telecommunications Association (“NCTA”) to the petition for reconsideration of the Commission’s *Report and Order* in the above captioned proceeding by the Consumer Groups.¹

APTS, NAB, and NCTA each oppose the Consumer Groups’ petition for reconsideration of the Commission’s decision to exclude “video clips” from the requirement that IP-delivered video programming be captioned pursuant to Section 202(b) of the Twenty-First Century Communications and Video Accessibility Act (“CVAA”). The opponents’ arguments fall into three categories:

1. That the CVAA does not require “video clips” to be captioned;²

¹ *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, Report and Order*, MB Docket No. 11-154, 27 FCC Rcd. 787 (Jan. 13, 2012) (“*Report and Order*”); *Consumer Groups Petition for Reconsideration*, MB Docket No. 11-154 (Apr. 27, 2012) (“*Consumer Groups Petition*”); *APTS Opposition to Petition for Reconsideration*, MB Docket No. 11-154 (June 7, 2012) (“*APTS Opposition*”); *NAB Opposition to Petition for Reconsideration*, MB Docket No. 11-154 (June 7, 2012) (“*NAB Opposition*”); *NCTA Opposition to Petitions for Reconsideration*, MB Docket No. 11-154 (June 7, 2012) (“*NCTA Opposition*”).

² *NAB Opposition* at 6-13; *APTS Opposition* at 2-5; *NCTA Opposition* at 2-5.

2. That the Commission's decision will serve the public interest;³ and
3. That reconsideration of the Commission's decision would be procedurally improper under rule 1.429.⁴

None of the arguments presented by the opponents can overcome the plain text of the CVAA, which makes clear that IP-delivered "video clips" constitute "video programming" that must be captioned. Nor do any of the opponents present compelling evidence that maintaining an improper loophole for "video clips" would serve the public interest. And because requiring "video clips" to be captioned would so strongly serve the public interest, reconsideration is appropriate under rule 1.429(b)(3). Accordingly, we urge the Commission to reconsider its decision in the *Report and Order* and eliminate its exclusion of "video clips" from the IP closed captioning rules.

I. IP-delivered "video clips" unambiguously constitute "video programming" that must be captioned under the CVAA.

In opposing the Consumer Groups' statutory arguments in our petition for reconsideration, the opponents primarily argue that "video clips" do not fall under the CVAA's definition of "video programming" and therefore need not be captioned.⁵ Specifically, NAB notes that "broadcasters and non-broadcast programmers airing programming on television generally do not air clips and excerpts."⁶ APTS asserts that "it is not in keeping with common understanding to equate a scheduled television 'program' or show with a video clip."⁷ Finally, NCTA contends that "[v]ideo clips that are posted online have not been

³ NAB *Opposition* at 14-16; APTS *Opposition* at 6-8; NCTA *Opposition* at 5-6.

⁴ NAB *Opposition* at 4-5; APTS *Opposition* at 7-8.

⁵ See NAB *Opposition* at 7-8; APTS *Opposition* at 2-4; NCTA *Opposition* at 2-3.

⁶ NAB *Opposition* at 7.

⁷ APTS *Opposition* at 4.

published or exhibited on television with captions in that form.”⁸

None of the opponents address, however, the basic reality that the CVAA’s definition of video programming is limited only by the *source* of programming. The CVAA defines video programming as “programming by, or generally considered comparable to programming provided by a television broadcast station.”⁹

For example, a full-length half hour program aired on a broadcast station is no doubt “by . . . a broadcast station.” But what if the broadcast is interrupted halfway through by an emergency announcement? The program is not delivered in its entirety, but is no less “by . . . a broadcast station” because of the truncation.

A similar half-hour program distributed by a cable channel also is undoubtedly “comparable to programming provided by a television broadcast station.” Again, what if the cable channel interrupts the program halfway through to switch to coverage of a presidential address? The program is still not delivered in its entirety, but is no less “comparable to programming provided by a television broadcast station” as a result.

This pattern does not somehow break down when either of the aforementioned programs is distributed on the Internet. Both programs no doubt are still either “by, or generally considered comparable to programming provided by a television broadcast station” when distributed via the Internet. But what if a user makes the decision to stop watching one of the programs halfway through, or the distributor’s servers crash? Again, the program is never delivered in its entirety – but it is most certainly still “by, or generally considered

⁸ NCTA *Opposition* at 3.

⁹ 47 U.S.C. § 613(h)(2).

comparable to programming provided by a television broadcast station.”

The CVAA does not permit a different result if the second half of the program is never delivered simply because the programmer chooses to make only first half available online. That “clip” of the full-length program is no less “by, or generally considered comparable to programming provided by a television broadcast station” than the full-length program itself, and therefore must be considered “video programming” under the CVAA’s definition.

Contrary to NAB’s assertion, the CVAA’s plain and unambiguous language specifically “*require[s] the provision of closed captioning on video programming delivered using Internet protocol*” so long as the programming is published or exhibited on television with captions.¹⁰ The CVAA does not permit the Commission to capriciously and arbitrarily exclude “video clips.” Because IP-delivered “video clips” undoubtedly constitute “video programming” under the CVAA, they must be captioned.

II. Excluding IP-delivered “video clips” from the IP captioning rules will not serve the public interest.

The opponents also argue that the Commission’s decision to exclude “video clips” from the IP captioning rules will serve the public interest. More specifically, they assert that requiring the captioning of video clips will discourage the voluntary captioning of programming exempt from the Commission’s rules for television closed captioning and impose untenable technical difficulties on distributors of online video. We encourage the Commission to reject these arguments.

¹⁰ 47 U.S.C. § 613(c)(2)(A). *But see NAB Opposition* at 8-9.

A. Excluding “video clips” from the IP captioning rules is unnecessary to relieve any burden of captioning IP-delivered programming.

First, APTS speculates that requiring “video clips” to be captioned could “discourag[e] the voluntary captioning of local video programming.”¹¹

Specifically, APTS asserts that some public television stations that are eligible for the Commission’s categorical exemption from the \$3 million exemption under rule 79.1(d)(9) may cease their voluntary efforts to caption their television programming if required to implement IP captioning.

We acknowledge and appreciate the efforts and leadership of public television stations in captioning television programming. But as we noted in a 2011 petition for rulemaking, the \$3 million exemption is no longer appropriate in light of drastic reductions in captioning costs since the Commission first promulgated the exemption more than a decade ago.¹² The widespread voluntary captioning cited by APTS underscores the reality that the exemption is no longer necessary and should be eliminated by rulemaking.

Moreover, if having to deliver “video clips” online with their existing captions intact would truly impose an undue economic burden on stations currently providing television captions on a voluntary basis, they may of course petition for individual exemptions under rule 79.4(d)(1). Consumer Groups have no desire for the CVAA to impede the delivery of captioned television programs. But any exemptions from the CVAA’s rules must be based on individualized evidence of economic burden and not speculative assertions that requiring the captioning of “video clips” will result in an untenable industry-wide burden.

¹¹ *APTS Opposition* at 7-8

¹² *TDI Petition for Rulemaking*, CG Docket No. PRM-11-CG, at 29-30 (Jan. 27, 2011)

B. Technical difficulties with captioning IP-delivered “video clips” are either not specific to “video clips” or are overstated.

Second, NCTA asserts that exempting “video clips” from the IP captioning rules is warranted because maintaining captions on “video clips” excerpted from full-length programming is difficult.¹³ NCTA insists that “[c]aptions are lost or garbled when a program is transcoded for delivery over the Internet, requiring captions for clips to be re-authored from scratch” and that “the manual process involved in captioning even a few minutes of footage for online viewing can take hours.”¹⁴ These claims mirror those in a recent ex parte filing from Hulu which noted that “in many cases [it] must manually synchronize captions to video programming in a process that is highly labor-intensive and time consuming.”¹⁵

These claims, even if true, appear to have no bearing on the particular difficulty of captioning “video clips” as opposed to all IP-delivered video. They merely indicate that video programming owners (“VPOs”) may not yet be complying with their basic obligations under rule 79.4(c)(1)(i) by “[sending] program files to video programming distributors with captions . . . with at least the same quality as the television captions provided for the same programming.” Unless the videos referenced by NCTA and Hulu are improperly “garbled” or unsynchronized on television, no re-captioning or re-synchronization should be necessary if VPOs are properly captioning programming in the first instance. Any compliance issues with rule 79.4(c)(1)(i) should be addressed by enforcing that rule, not by excluding “video clips” from the rules altogether.

NCTA further claims that captioning “video clips” is substantially more

¹³ *NCTA Opposition* at 5.

¹⁴ *Id.*

¹⁵ *Hulu Notice of Ex Parte*, MB Docket No. 11-154, at 1 (June 8, 2012).

burdensome than captioning full-length programming.¹⁶ But to the extent that NCTA's claims are true, overcoming any technical challenges to captioning "video clips" will be necessary for all distributors that choose to distribute full-length programming by chopping it into multiple segments for Internet distribution. The Commission agreed with widespread industry and consumer consensus that such segments must be captioned.¹⁷ Yet any technical challenge of maintaining captions for segmented full-length programming is no different than for "video clips," so any technical challenges inherent in captioning "video clips" do not justify their exclusion from the IP captioning requirements.

Moreover, there is no consensus in this proceeding that NCTA's technical concerns regarding captioning "video clips" are true, as the Commission acknowledged in the *Report and Order*.¹⁸ NAD and TAP explained in an ex parte filing that the process for generating excerpted "video clips" is largely similar with respect to captions as it is for both audio and video, and that mainstream software exists to facilitate the rapid assembly of captions based on an edit decision list from commonly used video editing software like Final Cut Pro.¹⁹

III. Reconsidering the Commission's decision to exclude "video clips" from the IP captioning rules would serve the public interest.

Finally, opponents contend that reconsideration of the Commission's decision to exclude "video clips" would be procedurally improper.²⁰ Specifically, opponents insist that reconsideration would be improper under rule 1.429(b).²¹

¹⁶ NCTA *Opposition* at 5-6; *see also* NAB *Opposition* at 14-16.

¹⁷ *Report and Order*, 27 FCC Rcd. at 816-17, ¶ 45 & n.197.

¹⁸ *Id.* at 816, ¶ 44, n.194.

¹⁹ Notice of *Ex Parte*, MB Docket No. 11-154 (Dec. 9, 2011).

²⁰ NAB *Opposition* at 4; APTS *Opposition* at 7.

²¹ *Id.*

Setting aside opponents' contention that reconsideration is not warranted under rule 1.429(b)(1)-(2), petitions for reconsideration are always appropriate under rule 1.429(b)(3) where reconsideration is in the public interest. Regardless of whether legal arguments could have been presented earlier in a proceeding, the Commission will rely on them where doing so will serve the public interest.²²

As we detailed at length in our petition for reconsideration, requiring captioning of IP-delivered "video clips" pursuant to the CVAA's unambiguous mandates would undoubtedly serve the public interest.²³ Congress enacted the CVAA to ensure equal access to video programming for all Americans; denying viewers who are deaf or hard of hearing access to the rapidly increasing amount of "video clips" delivered via IP would undermine the promise of the CVAA.²⁴

This problem would be particularly severe with respect to online news programming.²⁵ As NAB itself points out, the online distribution of news programming is one of the most important and popular means of accessing information.²⁶ Requiring that such programming be accessible via the inclusion of closed captions will ensure that all Americans have access to the currency of the information economy, while excluding it from the mandates of the IP captioning requirements will relegate viewers who are deaf or hard of hearing to second-class status with decreased participatory and economic opportunities.

Finally, NAB asserts that news programmers "want their high-value,

²² See, e.g., *Procedures to Govern the Use of Satellite Earth Stations on Board Vessels*, 24 FCC Rcd. 10,369, 10,374, ¶ 10 & n.31 (July 31, 2009) (service of the public interest provides an independent ground for reconsideration).

²³ *Consumer Groups Petition* at 12-17.

²⁴ *Id.* at 13.

²⁵ *Id.* at 14-17.

²⁶ *NAB Opposition* at 15 (citing Steven Waldman, *Information Needs of Communities* 76 (July 2011)).

unique, local news content accessible to as many viewers as possible,” expressing skepticism that programmers will resist making “video clips” accessible.²⁷ If NAB’s assertions are correct, then there can be no harm in requiring programmers to make “video clips” accessible. Compliance with a captioning requirement for “video clips” would impose no burden on programmers who already endeavor to make their content accessible. Likewise, requiring “video clips” to be captioned would ensure that the Commission can hold accountable those programmers who refuse to make their programming accessible.

CONCLUSION

There is no doubt that requiring IP-delivered “video clips” to be captioned would serve the public interest by fulfilling the CVAA’s promise of equal access to important news, entertainment and other programming. Because the CVAA’s plain and unambiguous language does not permit a different result, we reiterate our request that the Commission reconsider its contrary decision in the *Report and Order* and confirm that IP-delivered “video clips” constitute “video programming” that must be captioned under the CVAA.

Respectfully submitted,

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June 18, 2012

²⁷ *Id.*

[†] Counsel thanks Georgetown Law student Chris Poile for her assistance in preparing these reply comments.

CERTIFICATE OF SERVICE

I, Niko Perazich, Office Manager, Institute for Public Representation, do hereby certify that, on June 18, 2012, pursuant to the 47 C.F.R. § 1.429, a copy of the foregoing document was served by first class U.S. mail, postage prepaid, upon the opponents:

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